91-1042

No. _____

IN THE

Supreme Court of the United States

October Term, 1991

THOMAS C. DOYLE, Detective; CITY OF EASTLAKE; JOHN DOES, Unknown Eastlake Police Officers,
Petitioners,

vs.

JAMES M. PECSI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. IS IT CONSTITUTIONALLY PERMISSIBLE TO DETAIN THE OCCUPANT OF A RESIDENCE BEING SEARCHED PURSUANT TO A VALID WARRANT FOR FIVE TO SIX HOURS WHEN IT IS UNDISPUTED THAT THE DETENTION DID NOT LAST LONGER THAN THE SEARCH AND THERE IS NO OTHER EVIDENCE OF DILATORY OR OTHER POLICE MISCONDUCT WHICH PROLONGED THE DETENTION AND INCRIMINATING EVIDENCE WAS FOUND AT THE OUTSET AND THROUGHOUT THE SEARCH?

II. IS IT CONSTITUTIONALLY PERMISSIBLE FOR POLICE OFFICERS SEARCHING A HOUSE PURSUANT TO A VALID WARRANT TO HOLD AN OCCUPANT AT GUNPOINT WHEN IT IS UNDISPUTED THAT THE OCCUPANT HAS A CRIMINAL HISTORY INCLUDING THE USE OF WEAPONS?

III. CAN CLEARLY ESTABLISHED LAW FOR PURPOSES OF QUALIFIED IMMUNITY ANALYSIS BE FOUND IN GENERAL TERMS SUCH AS TO ACT REASONABLY OR MUST THE RIGHT BE CLEARLY ESTABLISHED AS A BRIGHT LINE BY STUDYING HOW THE COURTS HAVE APPLIED THESE GENERAL RIGHTS IN CONCRETE CIRCUMSTANCES?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, reversing in part is attached at Appendix A1. The Opinion of the Honorable Alvin Krenzler of the United States District Court for the Northern District of Ohio, Eastern Division, granting in part, and denying in part a Motion for Judgment on the Pleadings is appended at Appendix A9. The Opinion of the same court granting defendants' Motion for Summary Judgment is appended at Appendix A16. The order of the Sixth Circuit denying rehearing is appended at Appendix A25.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 26, 1991. Rehearing was denied on September 24, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE AND FACTS

The operative facts of this case provide that the respondent, James M. Pecsi, resides with his father in a house located in Eastlake, Ohio. The house is owned by the respondent's father, James E. Pecsi. Pursuant to a warrant signed by Judge Dennis Callahan on February 9, 1988, the Eastlake Police were authorized to conduct a daytime search of the aforementioned residence. The warrant permitted a search for a multitude of items which were referred to as "evidence in the offense of receiving stolen property."[1]

The search was conducted on February 9, 1988. The respondent's complaint alleges that the execution of the search warrant began the morning of February 9, 1988, and lasted until about 3:00 p.m. The respondent further alleges that he was forced to remain in a chair for approximately two to three hours until an attorney (called by his father) arrived at the house, at which point the respondent was permitted to move about the house, but only if accompanied by a police officer. Petitioner's affidavit in support of summary judgment stated that an officer was assigned to the respondent so as to guarantee that none of the evidence would be tampered with or destroyed and for the safety of the officers executing the warrant. The affidavit also stated that the respondent was known to have a history of violence as Petitioner,

[1] The search warrant was issued based on the affidavit of Sergeant Thomas Doyle and authorized seizure of Yamaha outboard motor, blue & white (hand controlled), second motor 9.9 Yamaha, pulley for steering controls located on a 24 ft. Pontoon (blue & silver in color), van doors, 2 passenger doors, 1 sliding door, 2 rear doors, tools, tool boxes—nail guns—chain saws—power saws—air staplers (serial nos. scratched off) 3 circular saws—drills, numerous hand tools, jacuzzi's (3) one still in box, various tools to be evidence in the offense of receiving stolen property, a violation of Section 2913.51 of the Ohio Revised Code.

Detective Thomas C. Doyle, had previously arrested him for an attempted burglary charge in which a weapon was used, and that the owner of the premises, James E. Pecsi, had a criminal history dating back to 1969. (See, Affidavit of Thomas Doyle, Appendix A28.) These facts were not disputed by the respondent in opposing summary judgment.

The respondent, in opposing the Motion for Summary Judgment, filed an affidavit stating that he was never frisked or subject to a pat-down by anyone and that he was forced, at gunpoint, to remain in a chair for two to three hours. (See Affidavits of James E. Pecsi and James M. Pecsi, Appendix A30-A33.)

Respondent admitted in discovery that the detention referred to in paragraph 9 of respondent's complaint did not last any longer than the time it took petitioners to conduct the search. (See respondent's answer to Request for Admission No. 16. Appendix, Exhibit A35.) The respondent offered no other evidence to establish that the search was unreasonable or prolonged.

The complaint in this case was filed in February of 1990 pursuant to Title 42 U.S.C. Section 1983, alleging violations of the respondent's Fourth and Fourteenth Amendment rights. The petitioners timely answered with a general denial and raised qualified immunity as an affirmative defense. The petitioners also served upon the respondent a set of Combined Interrogatories, Request for Production of Documents, and Requests for Admission. The petitioners then filed a Motion for Judgment on the Pleadings which was granted as to the Fourteenth Amendment claim, and denied as to the Fourth Amendment claim, and its collateral rights of action.

Shortly thereafter, the petitioners filed a Motion for Summary Judgment on the Fourth Amendment claim which was supported by the affidavits of the petitioners, the responses to the petitioners' discovery requests, and accepting as true for summary judgment purposes only, the allegations of the respondent's complaint. Upon consideration, the trial court issued a Memorandum of Opinion, finding that the acts of the petitioners were constitutionally permissible; that the individual petitioners were entitled to qualified good faith immunity; that the conspiracy charges were unsupported; and that the City of Eastlake did not have a custom, policy, or practice of depriving citizens of constitutional rights.

Based upon the foregoing, the respondent filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit presenting a single assignment of error arguing that the District Court erred by making a factual determination of reasonableness and by applying the rule of *Michigan v. Summers, infra,* as well as finding the petitioners were entitled to qualified immunity. The Circuit Court reversed the decision of the District Court finding that questions regarding reasonableness remained unanswered which preclude both summary judgment and the application of qualified immunity.

The petitioners contend that the rule of *Michigan v. Summers* clearly applies to the undisputed facts of this case, that the manner in which the search was conducted is fully constitutional, and that, at the very least, the individual petitioners are entitled to qualified good faith immunity as the facts do not establish a violation of a clearly established right.

REASONS FOR GRANTING THE WRIT

I. IT IS CONSTITUTIONALLY PERMISSIBLE FOR POLICE OFFICERS TO DETAIN THE OCCUPANT OF A RESIDENCE SEARCHED FOR STOLEN PROPERTY PURSUANT TO A VALID WARRANT FOR THE ENTIRE TIME IT TAKES TO CONDUCT AN EXTENSIVE SEARCH.

The respondent's complaint alleged a violation of the Fourth Amendment by petitioners because he was detained five to six hours while the police searched his house. This allegation was reiterated in the respondent's affidavits along with statements claiming that he was not personally searched or frisked and was held at gunpoint for two to three hours. The respondent did not allege or present any facts tending to establish that the search was prolonged or that police engaged in any other misconduct. Plaintiff-respondent admitted in discovery that he was not detained any longer than it took to conduct the search.

Based on the foregoing facts, the District Court found that both the duration of the detention and the manner of the detention were reasonable and constitutionally permissible.

In *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), this Court held that:

> "The initial detention of the occupant while the police executed a valid warrant to search his home for contraband, did not violate the occupant's Fourth Amendment right to be secure against an unreasonable seizure of his person, since the warrant, founded on probable cause, implicitly carried with it the limited authority to detain the occupants of a premises *while a proper search was conducted.*" (Paragraph 1 of syllabus, emphasis added.)

This Court in *Summers*, also stated that this authority is not limitless and that special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case. *Id.*, 452 U.S. at 705, fn. 21. Thus, *Summers* teaches that while the initial detention of the occupant is permissible, it will become illegal if the detention is prolonged. Footnote 21 has caused a flurry of legal activity in which the courts have attempted to deal with the terms prolonged, special circumstances and unusual case. Petitioner submits that this case offers the Court the opportunity to announce a rule clarifying a portion of footnote 21 by declaring that the detention cannot be prolonged if its duration is not longer than the search itself, and the plaintiff presents no other evidence of dilatory or other inappropriate conduct on the part of the police lengthening the detention.[2]

This rule would be in accord with what seems to be the intent of footnote 21. The paragraph upon which it is premised states that the warrant carries with it the authority to detain the occupants, "while a proper search is conducted." This Court did not attempt to establish an arbitrary rule based upon time consumed, but recognized an extensive search may take several hours. Indeed, even the dissent in *Summers*, *supra*, at footnote 3, recognized the reasonableness and legality of a five hour search for stolen cancelled checks and burglar tools conducted by five men in a four-room apartment. Citing, *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947). Further, as the issue of what constitutes a

[2] Other allegations of police misconduct would be weighed by the balancing test set forth in *Michigan v. Summers*, *supra*, at 702-703. The court must balance the nature of the intrusion against the legitimate law enforcement interests.

prolonged detention has come before the federal judiciary the trend is to find detentions of several hours to be reasonable, so long as the detention does not last longer than the search.

In *Daniel v. Taylor*, 808 F.2d 1401 (11th Cir. 1986), the court distinguished detentions of occupants made pursuant to search warrants from reasonable suspicion detentions such as in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed: 2d 889 (1968). The court noted that there was no indication from the Supreme Court how long the *Summers* search lasted, but that the Michigan Court of Appeals had stated that Summers was detained for the time it took, "to search the whole house." *People v. Summers*, 68 Mich. App. 571, 243 N.W.2d 689, at 691 (1976). The *Daniel* court stopped short of holding that a prolonged search is one beyond the time necessary to search the residence by declaring the state of the law on this issue to be ambiguous and, therefore, disposing of the case on qualified immunity. *Daniel v. Taylor*, 808 F.2d at 1403-05.

In *United States v. Rowe*, 694 F. Supp. 1420 (N.D. Cal. 1988), the defendant, Rowe, challenged the validity of her detention by police searching another's apartment on a warrant authorizing the seizure of one Douglas Costa and "evidence" relating to his escape. The defendant argued that if a brief detention was justified that this one was too long in duration to be reasonable. The court discussed *Summers*, *supra*, and *Daniel v. Taylor*, *supra*, and noted that the Supreme Court contemplated detentions "long enough to complete an extensive search" to be reasonable. *Rowe*, at 1424.

Ohio courts have also found it constitutionally permissible to detain the occupant for the duration of the search. In *State v. Schultz* (1985), 23 Ohio App. 3d 130,

cert. denied, Ohio Supreme Court, Case No. 85-742, now Chief Justice Moyer of the Ohio Supreme Court adopted the rationale of *Summers*, *supra*, in declaring it constitutionally permissible for officers to detain persons with a "reasonable connection" to a residence when conducting a search. In *Schultz*, *supra*, the officers entered the premises and secured all the occupants. They then handcuffed the occupant and seated him in a chair for the duration of the search. The handcuffing was permitted for security reasons, *i.e.*, for the safety of the officers, because the officers knew of the defendant's propensity to carry weapons. The defendant remained handcuffed throughout the length of the search which lasted approximately one hour and fifteen minutes. *Id.* at 131. *Also, see United States v. Price*, 888 F.2d 1206 (7th Cir. 1989); *United States v. Pace*, 898 F.2d 1218 (7th Cir. 1990); *United States v. Timpani*, 665 F.2d 1 (1st Cir. 1981).

Contrary to this trend, the United States Court of Appeals for the Sixth Circuit, in this case, found that a detention of an occupant for the duration may be unreasonable. Respondent in opposing summary judgment presented no facts to support a theory that the search was prolonged other than that it lasted five to six hours. Clearly, the respondent as the non-moving party had an obligation to present such facts under Rule 56 of the Federal Rules of Civil Procedure. *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 196 S. Ct. 2548 (1986). Instead of accepting the facts presented by the non-moving party, the Court of Appeals posed questions which respondent either failed to answer or could not answer. The court then found that questions of fact exist precluding summary judgment.

The circumstances of this case are appropriate for the adoption of a generic rule that the detention of an occupant of a residence being searched pursuant to a valid warrant is not prolonged or unreasonable simply because the detention lasted as long as the search. A plaintiff in such a case cannot defeat a Motion for Summary Judgment solely on the claim that the detention and search lasted five to six hours. It is incumbent that additional evidence of dilatory or other police misconduct be alleged in order for the detention to be prolonged and, therefore, unconstitutional. Without such evidence there simply is no issue as to reasonableness.

II. THE PETITIONERS HAD PROBABLE CAUSE TO HOLD THE RESPONDENT BEYOND THE INITIAL DETENTION BECAUSE STOLEN PROPERTY DESCRIBED IN THE SEARCH WARRANT WAS FOUND IN HIS RESIDENCE.

If, for argument's sake, a detention can be considered prolonged within the time frame of the search itself, the detention of this respondent was not prolonged as probable cause for a continued detention, if not arrest, arose each time incriminating evidence was found. In *Rowe, supra,* it was found that if the initial detention was justified by the warrant, a continued detention was justified in view of the fact incriminating evidence was found in the first fifteen minutes of the search. The Affidavit of Petitioner Detective Doyle establishes that stolen items were discovered at the outset of the search. See, Appendix A29, paragraph 13. Thus, the petitioners had probable cause for a continued detention outside of the authority derived from the warrant.

Petitioners submit that police officers armed with a search warrant may detain the occupant-resident beyond the initial detention after items listed in the search warrant are discovered. At this point, the detention is supported by probable cause and not simply implicit in the authority of the warrant.

III. IT IS CONSTITUTIONALLY REASONABLE AND PERMISSIBLE FOR POLICE OFFICERS TO HOLD THE OCCUPANTS OF A HOUSE AT GUNPOINT WHILE IT IS BEING SEARCHED PURSUANT TO A VALID WARRANT WHEN THE POLICE OFFICERS HAVE PERSONAL KNOWLEDGE OF THE OCCUPANT'S CRIMINAL HISTORY INCLUDING THE USE OF WEAPONS IN THE COMMISSION OF A CRIME.

The Sixth Circuit remanded this case to the District Court with an instruction to determine, *inter alia*, "Was it objectively reasonable to hold Pecsi at gunpoint for two to three hours during the search?" See, Opinion of court below, Appendix A6. While the petitioners deny this allegation, it was accepted as true for purpose of summary judgment. Petitioners argue that given the undisputed facts regarding the criminal history of both the respondent and his father, that such precaution was not only reasonable, but sound police practice.

It is clearly established that detentions of occupants of premises searched pursuant to a valid warrant are reasonable even if the person is handcuffed or held at gunpoint and there is no indication through personal knowledge of immediate danger. In *United States v. Pace, supra*, the court considered the nature of the criminal activity (gambling) underlying a search warrant and found:

> "... it was not unreasonable to assume that the people found in Savide's apartment (the premises searched) might be armed, or might have access to weapons outside the apartment." *Id.*, 898 F.2d at 1239.

Likewise, it is not unreasonable for police to assume that persons suspected of theft might be armed and dangerous or have access to arms. This assumption is reasonable even without the knowledge that the detained person has a criminal history. *Also, see United States v. Timpani*, 665 F.2d 1 (1981); *State v. Schultz, supra.*

A similar determination was made in the matter of *United States v. Price*, 888 F.2d 1206 (7th Cir. 1989). The detained occupant was ordered to lie naked on the floor and held at gunpoint. Obviously, a frisk would have been senseless. Nonetheless, Price remained on the floor until the area was secured when the officers gave him clothes. The court found the detention reasonable in view of the authority and rationale of *Michigan v. Summers, supra.* Likewise, the detained person in *United States v. Rowe, supra*, was also handcuffed, restrained to a chair and held at gunpoint during the search. The court in *Rowe*, after reviewing the matter, was moved to declare that:

> "Considering the totality of the circumstances surrounding the search, the detention of the defendant was nothing more than sound police practice." *Rowe* at 1424.

Given the undisputed fact that the petitioners had personal knowledge of the respondents 's use of weapons in the past, it was not unreasonable for the police officers to hold him at gunpoint; especially in view of the law enforcement interests of preventing flight, frantic efforts to conceal evidence and harm to both police and occupants. *Summers*, 452 U.S. at 702.

IV. BEFORE A PUBLIC OFFICIAL EXERCISING A DISCRETIONARY FUNCTION CAN BE DENIED QUALIFIED IMMUNITY, THE PLAINTIFF MUST ESTABLISH THAT THE RIGHT ALLEGED TO BE VIOLATED WAS CLEARLY ESTABLISHED IN A PARTICULARIZED SENSE AND MAY NOT RELY ON GENERALIZED RIGHTS SUCH AS REASONABLENESS.

The United States Court of Appeals for the Sixth Circuit denied petitioners' request for qualified immunity finding that, "Clearly established law requires that 'the officers remain on the premises only so long as is *reasonably* necessary to conduct the search.' " The court adopted this position from dicta found in *Tarpley v. Green*, 684 F.2d 1, 9 (D.C. Cir. 1982). See, Opinion of Court below, Appendix A7.

This Court, in *Anderson v. Creighton*, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) stated that:

> Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) (Paragraph 1 of syllabus).

The Court emphasized that the contours of the right alleged to be violated must be sufficiently clear in a particularized sense so that a reasonable official will understand that what he is doing violates that right. *Id.* at 640. This requirement accommodates the public policy that police officers should be free to discharge their duties without fear of personal monetary liability or harassing litigation. *Anderson*, at 638. The clearly

established standard protects the officer on the street who is required to react to unique and difficult situations and also permits vindication for those whose rights have been violated by the officer who is plainly incompetent or knowingly violates the law. *Anderson*, at 638; *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). Clearly, if qualified immunity in a case alleging a violation of the Fourth Amendment is resolved on the basis of a generalized right such as reasonableness, which is itself the touchstone of the Fourth Amendment, then there simply is no qualified immunity available.

The *Anderson* court, therefore, recognized that the clearly established standard depends substantially upon the generality of which the legal right is identified. Recognizing that the right must be established in a more particularized sense, this Court declared that:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent. *Anderson v. Creighton, supra*, at 640.

It is undisputed that the respondent was not detained any longer than it took to conduct the search. The affidavit of Detective Doyle established that the respondent and his father were known criminals with a conviction for attempted robbery while using a weapon. These facts were not opposed by the respondent in his affidavit. In fact, the only statements in his affidavit opposing summary judgment concerning the manner of the detention were that it lasted about six hours, that

respondent was never frisked or subjected to a pat-down and that he was held at gunpoint for approximately two to three hours.

The state of the law regarding detentions of occupants of a residence being searched pursuant to a valid warrant at the time of this incident was contained in this Court's ruling in *Michigan v. Summers, supra*, which establishes that the respondent's initial detention was clearly permissible. Consequently, the respondent claimed that his case arose out of footnote 21 of *Michigan*, which states:

> Although special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case. *Summers* at 705.

While this footnote has a bearing on the ultimate question of reasonableness under the Fourth Amendment, it does not provide "clearly established" law for qualified immunity analysis. The generality and ambiguity of footnote 21 was, however, ignored by the Circuit Court in its qualified immunity analysis. Clearly, it establishes only uncertainty in this area of the law. Petitioner suggests that the holding below is directly at odds with other Circuit Court decisions as well as the guidelines set forth by this Court in *Anderson v. Creighton, supra.*

While this Court in *Summers* did not define the term "prolonged", it is universally accepted that the court contemplated that occupants could be detained long enough for police to conduct extensive searches. See, Opinion of the court below, A5; *Daniel v. Taylor*, 808 F.2d 1401 (11th Cir. 1987); *United States v. Rowe*, 694 F. Supp. 1420 (N.D. Cal. 1988).

The matter of *Daniel v. Taylor, supra,* involves an issue similar to this case. The Eleventh Circuit was called upon to determine the constitutionality of a two-hour and forty-five minute detention of an occupant of a premises searched by police. The Court reviewed the law on such detentions but declined the opportunity to define the term prolonged or rule on reasonableness. Rather, the court granted summary judgment for the defendant officers stating that:

> Since the dissenters in *Summers* expressly raised the point, the *Summers* majority apparently appreciated that the concept of detention during searches of premises entails the prospect of detentions lasting several hours. *Michigan v. Summers*, 452 U.S. 692, 712, 101 S.Ct. 2587, 2598, 69 L.Ed.2d 340 (1981) (Stewart, J., dissenting). Nevertheless, we do not hold that the detention in this case complied with the Constitution; we do not even address that question. Instead, we just recognize that the law is ambiguous as to when detention in conjunction with a lawful, premises search becomes impermissible.
>
> Although it might not do so, the *Summers* exception to the requirement of probable cause might extend to the present case. The unsettled character of this legal question is evident and demonstrates that no "clearly established" fourth amendment right of plaintiff was violated. Therefore, defendants are entitled to qualified immunity. *Taylor*, at 1405.

Additional support for the permissibility of the alleged duration of this detention is found in the affidavit of Petitioner Doyle stating that stolen items were discovered at the outset of the search. Since respondent was a resident of the premises in which a myriad of stolen property was discovered, his continued

detention became wholly permissible. See, *United States v. Rowe*, 694 F. Supp. 1420 (N.D. Cal. 1988). Respondent has never disputed the fact that stolen property was found.

The petitioners, in their Motion for Summary Judgment, accepted the respondent's allegations that the respondent was detained five to six hours and that he was held at gunpoint. Respondent presented no other evidence of dilatory conduct or any police misconduct to support his claim that the detention was prolonged. The respondent admitted that he was not detained any longer than it took to search the premises and did not dispute the petitioners' affidavit stating that the officers had knowledge of his criminal past including the use of weapons. Based on these established and undisputed facts, there simply is no violation of clearly established law.

Petitioners are now in the position that this Court sought to avoid in *Anderson v. Creighton, supra.* How is the average police officer to anticipate when his conduct may give rise to liability for damages when it will be measured on the basis of reasonableness? The District Court Judge found the actions of respondents to be constitutionally permissible. The Sixth Circuit indicated that the actions may have violated clearly established law. If these learned jurists cannot agree, how can the reasonable police officer on the street know that this detention was clearly proscribed by law?

Not only is plenary review required to correct the error of the Court of Appeals' finding "clearly established" law in the realm of reasonableness, it will also provide the Court with an opportunity to clarify the "clearly established" standard, so that the lower courts do not base qualified immunity decisions on generalized standards.

V. QUALIFIED IMMUNITY SHOULD ONLY BE DENIED WHEN THE PLAINTIFF ESTABLISHES THAT THE DEFENDANT HAS VIOLATED CLEARLY ESTABLISHED LAW BY CROSSING A BRIGHT LINE ILLUMINATED THROUGH THE APPLICATION OF GENERALIZED CONSTITUTIONAL RIGHTS IN CONCRETE CIRCUMSTANCES.

The United States Court of Appeals for the Eleventh Circuit in the matter of *Barts v. Joyner*, 865 F.2d 1187 (1989), determined that the "clearly established" standard found in *Anderson v. Creighton*, *supra*, demands that a bright line be crossed before qualified immunity can be denied. The court in *Joyner* provided a review of the qualified immunity requirements set forth by this Court in *Harlow v. Fitzgerald*, *supra*, and *Anderson v. Creighton*, and declared that:

> The *Harlow* decision sets up a bright-line test that is a powerful constraint on causes of action under Section 1983. To defeat a qualified immunity defense, plaintiff bears the burden of showing that, "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, ... the law clearly proscribed the actions the defendant . . . took." *Mitchell v. Forsyth*, 472 U.S. at 528, 105 S.Ct. at 2816, 86 L.Ed.2d at 426. *Joyner*, at 1190.

The *Joyner* court noted that general propositions of law have little to do with the concept of qualified immunity. The court recognized it is clearly established that unreasonable seizures are prohibited, as are arrests without probable cause, but that a far more narrow inquiry is necessary. As an illustration of the type of inquiry required in qualified immunity analysis, it was stated that:

> The question in this case is far more sharply focused: in March 1983, was it clearly established in this circuit that it was an unconstitutional seizure for a single police officer—shortly after a murder—to have a person in a public place accompany him (along with other family members who were potential witnesses) to police headquarters for further questions, where the person had initiated contact with law enforcement officials by going to a police station to report the murder, had claimed to have seen the shooting and the assailant who was still at large, had remained in the officer's presence while willingly assisting with the investigation, and never objected to traveling to headquarters? *Joyner*, at 1190.

The *Joyner* court answered the question in the negative finding that the relevant case law was still developing and that the bright line of clearly established law remained to be staked out by a process of inclusion and exclusion in individual cases. The Eleventh Circuit provided guidance for its lower courts in determining the existence of a bright line rule by holding that:

> The line between the lawful and the unlawful is often vague. Harlow's "clearly established" standard demands that a bright line be crossed. The line is not to be found in abstractions—to act reasonably, to act with probable cause, and so forth—but in studying how these abstractions have been applied in concrete circumstances. *Joyner*, at 1194.

Petitioners submit that this case provides the Court an opportunity to clarify the rule of qualified immunity by adopting this bright line rule. Clearly established law cannot be found in dicta or in generalized standards such as reasonable or probable cause. If that be the case one

need not look any further than the text of the Fourth Amendment itself. The police officers of this country cannot face monetary liability on the basis of generalized rights on which learned constitutional scholars disagree. Adoption of the bright line rule as set forth in *Barts v. Joyner, supra,* will help clarify when the law is clearly established and offer protection to all police officers except the clearly incompetent and those who knowingly violate the law.

CONCLUSION

In view of the aforestated law and argument it is respectfully requested that this Court grant this Petition for Writ of Certiorari. The decision of the United States Court of Appeals for the Sixth Circuit in this case is in conflict with the decision in *Daniel v. Taylor, supra.* Further, this case presents the Court with an opportunity to provide guidance to the lower courts on the issue of when the detentions of occupants of a house searched pursant to a valid warrant become prolonged and constitutionally suspect, and to clarify the type of analysis which must be made in determining the existence of a clearly established right for qualified immunity purposes.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 26, 1991)

No. 90-4039

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES M. PECSI,
Plaintiff-Appellant,

v.

THOMAS C. DOYLE, Detective; CITY OF EASTLAKE; JOHN DOES, unknown Eastlake Police Officers,
Defendants-Appellees.

Before: JONES and SUHRHEINRICH; *Circuit Judges*; and CONTIE, *Senior Circuit Judge.*

PER CURIAM. This is a fourth amendment case in which the plaintiff argues that his detention by police officers executing a valid search warrant was unconstitutionally prolonged. Finding that the five or six hour detention of plaintiff during the search was not unconstitutional, the district court granted defendants'

motion for summary judgment. We find, however, that the issue of whether the length of the detention violated the fourth amendment is a question of fact for a jury. As a result, we reverse the summary judgment for defendants and remand for further proceedings.

I

Plaintiff-appellant James M. Pecsi lived with his father, in a house owned by his father, at 35685 West Island Drive in Eastlake, Ohio. On February 9, 1988, Eastlake police arrived at the house, armed with a valid search warrant, to search for stolen property. The search warrant was supported by an affidavit from Detective Thomas Doyle. In the affidavit, Doyle stated that an informant and close associate of the Pecsis told the informant that Pecsi and his father had stolen a pontoon motor boat and trailer four years before in Pennsylvania. The Pennsylvania State Police confirmed the theft, and visual observations of the Pecsis by Eastlake police showed that the Pecsis were using the stolen items. The affidavit also contained a list of the items which were the focus of the search.

During the search, which (we assume for purposes of this appeal) lasted five or six hours, Detective Doyle and other police officers forced Pecsi to sit in a chair for two to three hours at gunpoint. The officers did not search Pecsi. After an attorney arrived, the police permitted Pecsi to move about the house if accompanied by an officer.

Pecsi filed his complaint under 42 U.S.C. §1983 on February 7, 1990 in the U.S. District Court for the Northern District of Ohio, alleging violations of the fourth and fourteenth amendments. On March 9, 1990, defendants filed a Motion for Judgment on the Pleadings

pursuant to Fed. R. Civ. P. 12(c). The district court granted the motion with respect to Pecsi's fourteenth amendment due process claim, but found that Pecsi's fourth amendment claim could not be dismissed solely on the pleadings. The defendants filed a motion for summary judgment on the fourth amendment claim on July 23, 1990. On October 12, 1990, the district court dismissed the fourth amendment section 1983 claim against the City of Eastlake and Detective Doyle.

The district court found that Pecsi did not suffer any deprivation of a constitutional right because: (1) the police did not body search or arrest Pecsi; and (2) there was no "public stigma" because the detention was in Pecsi's home. Furthermore, the police had a substantial interest in reducing the risk to the officers and preventing the destruction of evidence. The district court also found that Doyle was entitled to qualified immunity because his actions were objectively reasonable under clearly established law, relying on *Michigan v. Summers*, 452 U.S. 692 (1981). Summary judgment as to the City of Eastlake was granted because Pecsi came up with no evidence of a policy or custom which caused his "injuries." This appeal of the fourth amendment issue followed.

II

The district court correctly stated the standard of review on a summary judgment motion:

> Summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. The moving party can meet its burden by demonstrating the absence of a genuine issue of material fact. Should the moving party meet its burden, the non-moving party "must come forward

> with specific facts showing that there is a genuine issue for trial." Where, taking the record as a whole, reasonable minds can come to but one conclusion, there is no genuine issue of fact, and summary judgment may be granted.

J. App. at 120 (district court opinion) (citations omitted).

Pecsi argues that the length and nature of his detention were violations of the fourth amendment, citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) ("[I]t is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out."). Pecsi also relies on a footnote in *Michigan v. Summers*,[1] 452 U.S. 692 (1981), which states:

> Although special circumstances, *or possibly a prolonged detention*, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case.

452 U.S. at 705 n.21 (emphasis added). Pecsi then suggests that summary judgment was not appropriate because the district court was required to make a finding of fact as to whether this case involved a "prolonged detention." Pecsi also argues that the manner of restraint—at gunpoint for several hours—was objectively unreasonable.

---

[1] A preliminary issue concerned the applicability of *Summers*. In stating its holding, *Summers* referred to "a warrant to search for contraband". 452 U.S. at 705. Pecsi argues that *Summers* should not be applied because the officers in the instant case were searching for "evidence" rather than "contraband". Pecsi finds support for his position in a footnote in *Summers* which stated that "[w]e do not decide whether the same result would be justified if the search warrant merely authorized a search for evidence." 452 U.S. at 705 n.20 (citations omitted). For the purposes of this case, however, we find *Summers* to be applicable. We leave a definitive resolution of the evidence/contraband distinction for another day.

We agree with the government that "[o]fficers searching a location have the authority to detain the occupants while a proper search is conducted." *United States v. Smith*, 704 F.2d 723, 725 (4th Cir.), *cert. denied sub nom. Palmer v. United States*, 464 U.S. 817 (1983). *See also United States v. Rowe*, 694 F. Supp. 1420, 1424 (N.D. Cal. 1988) ("Although the *Summers* Court did not define the duration of permissible detention, it apparently contemplated that occupants could be detained long enough for police to complete extensive searches."). However, the right to detain the occupant of a house for the length of the search is not limitless.

Our examination of the record in this case reveals questions relating to the reasonableness of the length of the search which should have precluded summary judgment. First, it is not clear that the search should have required five to six hours. The items on the list attached to Officer Doyle's affidavit were large and bulky, such as several chain saws, a television set, a tool box, a trailer, and two boats. The officers were not searching for small, easily concealable items which would necessitate a detailed search through every nook and cranny. Furthermore, Officer Doyle's February 1988 affidavit stated that many of the items could be found in the garage. The conclusion that locating the items listed in the warrant was not overly involved is supported by Officer Doyle's July 1990 affidavit, which stated that "[w]ithin 15 minutes after the search began, items reported stolen were discovered within the residence[.]" J. App. at 67.

In our view, this case simply presented too many unanswered factual questions to be resolved on summary judgment. For example, were the officers engaged in the search during the entire five to six hours? Were the

objects listed in the warrant capable of secretion so as to justify a search of that length? Was it objectively reasonable to hold Pecsi at gunpoint for two to three hours during the search?

In addition, this is not a case involving a broadly worded search warrant in which the evidence could take several forms. *See United States v. Santarelli*, 778 F.2d 609, 615-16 (11th Cir. 1985) ("[Although the informant] was able to describe several items . . . he could not have known precisely what other evidence of loansharking the residence contained. . . . It follows that [defendant] would have no cause to object if the agents had entered his home to examine the documents and remained there as long as the search required."). In the case at bar, the search warrant provided a detailed and specific list of all the items sought; thus; the scope of the search was narrow.

The district court found that "the public stigma" was minimal because the detention was in Pecsi's home and because a body search or trip to the police station would be a comparatively greater intrusion. Although these factors are relevant considerations in evaluating the nature of the intrusion under *Summers*, 452 U.S. at 701-02, we emphasize that *Summers* contemplated that "a prolonged detention" could be a violation of the fourth amendment. *Id.* at 705 n.21. The narrow holding of *Summers* is that officers executing a valid search warrant have "limited authority" to detain the occupants during the search. *Id.* at 705. Under the circumstances of this case, we are unable to conclude that this "limited authority" extends to a five to six hour detention when the items listed in the affidavit may well have been in plain view. The issues relating to the ultimate factual

determination of reasonableness should not have been decided by the district court on a motion for summary judgment. Thus, we reverse and remand in order to allow a jury to assess whether the detention of Pecsi during the entire five to six hour search was reasonable in light of the scope of the warrant. In assessing the reasonableness of the detention, it would be appropriate for the trier of fact to address whether any of the items were concealed, or whether the size of the items listed on the search warrant could reasonably require a five to six hour search of a two-story home and garage.

The district court also found that all defendants were entitled to qualified immunity. Police officers are ordinarily entitled to qualified immunity if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court later refined the *Harlow* test by permitting qualified immunity to be afforded if the officer's conduct was objectively legally reasonable. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Clearly established law requires that "the officers remain on the premises only so long as is reasonably necessary to conduct the search[.]" *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982) (quoting 2 W. LaFave, Search and Seizure § 4.10 (1978)). *See also Dalia v. United States*, 441 U.S. 238, 258 (1979) ("[T]he manner in which a warrant is executed is subject to later judicial review as to its reasonableness."). As discussed above, however, the factual questions which remain unanswered hinder a determination of reasonableness. Under these circumstances, "the jury becomes the final arbiter . . . of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury." *Brandenburg v. Cureton*, 882 F.2d

211, 215-16 (6th Cir. 1989). Due to the undeveloped factual record in this case we cannot conclude that the police officers deserved qualified immunity.[2]

We affirm the district court's grant of summary judgment for the City of Eastlake because Pecsi has not come forth with any evidence which would indicate that a policy or custom of the city caused his injuries, as required by *Monnell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978).

III

The district court's grant of summary judgment in favor of Officer Doyle and the unidentified officers is REVERSED, and the matter is REMANDED for further proceedings consistent with this opinion.

By /s/ VALERIE FIELD
Deputy Clerk

ISSUED AS MANDATE: October 2, 1991

COSTS: None

[2] The district court ended the qualified immunity inquiry after stating that *Summers* allowed officers to detain an occupant of a house while conducting an authorized search of the house. The issue in this case, however, is not whether the defendants could have detained Pecsi. Rather, the issue is whether the length of the detention was unreasonable under the fourth amendment.

ORDER OF THE UNITED STATES DISTRICT COURT RE MOTION FOR JUDGMENT ON THE PLEADINGS

(Filed April 2, 1990)

Case No. 1:90CV00252

JAMES M. PECSI,
Plaintiff,

v.

DETECTIVE THOMAS C. DOYLE, etc., *et al.*,
Defendants.

ORDER GRANTING IN PART AND OVERRULING IN PART DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff, James M. Pecsi, filed a multi-count complaint which contains a 42 U.S.C. §1983 cause of action. In substance, the complaint is alleging that his constitutional rights were violated when he was subjected to an illegal and unconstitutional seizure of his person and when he was restrained of his liberty in his home while certain defendant law enforcement officers were making a search, pursuant to a search warrant. He is also alleging that his constitutional rights were violated when his boat was seized without a warrant, without probable cause, and without any reasonable

justification in law. The plaintiff also has several pendent state claims, including false arrest, false imprisonment, and intentional infliction of emotional distress.

The defendants filed an answer which is basically in the form of a general denial, together with several affirmative defenses. The defandants contend that the plaintiff's complaint fails to state a cause of action. Also, defendant, Detective Thomas Doyle, alleges that he is immune from liability pursuant to the doctrine of absolute and/or good faith immunity. Further, the defendants contend that the actions of the individual defendants are not in accordance with established custom, policy and practice of the City of Eastlake.

The defendants filed a motion for judgment on the pleadings for the following reasons:

> (1) The alleged seizure and detention of the plaintiff was reasonable and not repugnant to Fourth Amendment guarantees as the detention took place during a search of the plaintiff's premises conducted pursuant to a valid search warrant.
>
> (2) Count II of plaintiff's first claim fails to state a denial of a constitutional right because plaintiff has failed to plead and prove inadequacy of state remedies for the return of his boat.

DISCUSSION

The defendants are contending that the plaintiff has failed to allege a violation of a constitutional right and are therefore seeking judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

In order for the defendants to prevail on the motion for judgment on the pleadings, when the allegations of the pleadings are reviewed in a light most favorable to the nonmoving party there must be no set of facts upon which the plaintiff can prevail. In other words and simply stated, if the facts as alleged are undisputed, the defendants are stating that the complaint does not state a cause of action for a constitutional violation under color of law.

The allegations of the complaint, in effect, are that a search warrant was issued for the search of the plaintiff's father's house in which the plaintiff lived, and that during the search he was restrained of his liberty unlawfully.

There is no question that when a search warrant is issued for the search of a house the occupants may be restrained during the period of the search, assuming the search takes place for a reasonable time and the restraint is for a reasonable time. In this case, the search began at about 10:30 a.m. and lasted until 3:00 p.m., some four-and-one-half hours. During this period of time, the plaintiff, in effect, was restrained of his liberty and, for all practical purposes, was under arrest.

It cannot be held as a matter of law that if a search of a house is conducted pursuant to a search warrant and a person living in the house is restrained of his liberty for a period of four-and-one-half hours, such person does not state a 42 U.S.C. §1983 claim for an unreasonable seizure. It is the ruling of this Court that as to the restraint during the period of the search, the plaintiff does state a cause of action. Therefore, the motion for judgment on the pleadings as to this issue is overruled.

As to the motion for judgment on the pleadings regarding the claim that the plaintiff's boat was unlawfully seized, the motion is granted. This is a 42 U.S.C. §1983 case alleging constitutional violations under color of law. The taking of the plaintiff's boat during the search pursuant to the search warrant does not rise to the level of a constitutional tort and, therefore, the defendants are entitled to judgment on the pleadings. This does not mean that the plaintiff does not have a state cause of action in regard to recovering his boat. There are a variety of causes of action under state law for the recovery of his boat and damages.

Therefore, the defendants' motion for judgment on the pleadings as to the unlawful detention is overruled, and as to the taking of plaintiff's boat, the motion for judgment on the pleadings is granted.

It is further noted that the defendant, Detective Thomas Doyle, has alleged as an affirmative defense that he is immune from liability pursuant to the doctrine of absolute and or good faith immunity. Under these circumstances, a defendant, after a brief period of discovery, may file a motion for summary judgment where the issue of good faith immunity can be addressed.

In regard to the City of Eastlake, it can only be liable if its police officer's conduct was pursuant to, and in furtherance of, policies and customs of the City. Therefore, in order for the plaintiff to recover against the City of Eastlake, he must establish by the evidence at trial that his constitutional rights were violated under color of law and that this was pursuant to the City's policies and customs.

Based on all of the foregoing, this case shall proceed on plaintiff's 42 U.S.C. §1983 case for an alleged violation of his constitutional rights, based on the seizure

of his person during the search pursuant to the warrant and the other counts of the claim, except the claim involving the seizure of the boat.

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

Albert Purola
William Schmitz

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed October 12, 1990)

Case No. 1:90CV0252

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES M. PECSI,
Plaintiff,

vs.

DETECTIVE THOMAS C. DOYLE, etc.
PRESENTLY UNKNOWN EASTLAKE POLICE OFFICERS, etc., CITY OF EASTLAKE,
Defendants.

JUDGMENT ENTRY

JUDGE ALVIN I. KRENZLER

The Court, having separately filed its Memorandum of Opinion and Order Granting Defendants' Motion for Summary Judgment, hereby enters judgment in favor of the defendants, Thomas C. Doyle, individually and officially; presently unknown Eastlake police officers, individually and officially; and the City of Eastlake, and against the plaintiff, James M. Pecsi, as to each of the claims contained in the plaintiff's complaint.

The Court dismisses the plaintiff's pendent state law claims pursuant to the rule enunciated in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

/s/ ALVIN I. KRENZLER
United States District Judge

Albert Purola
William Schmitz

MEMORANDUM OF OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed October 12, 1990)

Case No. 1:90CV0252

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES M. PECSI,
Plaintiff,

vs.

DETECTIVE THOMAS C. DOYLE, etc.
PRESENTLY UNKNOWN EASTLAKE POLICE
OFFICERS, etc., CITY OF EASTLAKE,
Defendants.

MEMORANDUM OF OPINION AND ORDER
GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

JUDGE ALVIN I. KRENZLER

I. INTRODUCTION

On February 7, 1990, the above-captioned case was commenced by the plaintiff, James M. Pecsi, against Detective Thomas C. Doyle ("Doyle"), officially and individually; presently unknown Eastlake police officers ("unknown police officers"), individually and officially;

and the City of Eastlake ("City"). In count I of his complaint, the plaintiff alleges that defendants Doyle and unknown police officers restrained him in his home thereby transgressing his Fourth and Fourteenth Amendment rights in violation of 42 U.S.C. §1983. In count II, the plaintiff avers that his Fourth and Fourteenth Amendment rights were breached in violation of 42 U.S.C. §1983 when defendants Doyle and unknown police officers seized his boat. In count III, the plaintiff claims that defendant City has a policy and/or custom of abuse of police powers by which it fails to select, train, discipline, and supervise defendants Doyle and unknown police officers, and that such policy and/or custom has breached the plaintiff's constitutional rights in violation of 42 U.S.C. §1983. Count III further alleges that the acts of the defendants result from an agreement to deprive the plaintiff of his constitutional rights. The plaintiff also alleges claims under 42 U.S.C. §1988 and state common law.

The defendants filed an answer in which they generally denied the plaintiff's allegations. Therein, the defendants also alleged that defendant Doyle is immune from liability, pursuant to the doctrine of qualified immunity. The defendants subsequently filed a motion for judgment on the pleadings, and each party submitted memoranda in support of their respective positions. The Court granted defendants' motion for judgment on the pleadings as to the unconstitutional seizure of the plaintiff's boat.

Thereafter, the defendants filed a motion for summary judgment, alleging that they were entitled to judgment as a matter of law on the remaining federal claims—unconstitutional seizure of the plaintiff and liability of the City on policy and/or custom. The

defendants argued that defendant Doyle was immune from suit under the principles of qualified immunity, and that the City has no policy or custom as alleged by the plaintiff. Each party has submitted memoranda in support of their respective positions.

The Court grants the defendants' motions for summary judgment as to the plaintiff's 42 U.S.C. §1983 claim against defendant Doyle and unknown police officers for the alleged unconstitutional seizure of the plaintiff. Further, the Court grants the defendants' motion for summary judgment as to the plaintiff's 42 U.S.C. §1983 claim against the City of policy and/or custom. The decision of the Court is based on the following reasons.

II. FACTUAL BACKGROUND

The following facts are those alleged by the plaintiff. The plaintiff, James M. Pecsi, resides with his father, James E. Pecsi, in a house owned by his father located at 35685 W. Island Drive, Eastlake, Ohio. On February 9, 1988, defendants Doyle and unknown police officers searched the plaintiff's residence pursuant to a search warrant, the validity of which has not been challenged by the plaintiff.

The search warrant empowered the defendants Doyle and unknown police officers to search the plaintiff's residence for stolen property. The search warrant was supported by defendant Doyle's detailed affidavit in which he listed the items to be seized during the search. The items were to be used as evidence in the offense of receiving stolen property, a violation of §2913.51 of the Ohio Revised Code. The warrant did not authorize the search of the plaintiff, nor does he allege that he was unconstitutionally searched.

During the course of the search, defendants Doyle and unknown police officers held the plaintiff at gun point and forced him to remain in a chair for approximately two to three hours. At some point, an attorney arrived at the plaintiff's house; thereafter, the plaintiff was permitted to move about the house but only accompanied by a police officer. The search began sometime in the morning on February 9, 1988, and did not conclude until approximately 3:00 p.m., at which point the plaintiff was freed from police restraint.

III. DISPOSITION

Summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party can meet its burden by demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Should the moving party meet its burden, the non-moving party "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Where, taking the record as a whole, reasonable minds can come to but one conclusion, there is no genuine issue of fact, and summary judgment may be granted. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In determining whether there exists a genuine issue of fact for trial, the Court must view the facts in a light most favorable to the non-moving party. *United States v. Diebold*, 369 U.S. 654, 655 (1962) (*per curiam*). Further, summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an essential element of his case. In such a situation, "there can be no genuine issue as to any material fact, since a complete

failure of proof concerning an essential element necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. It is within this legal framework that the Court has granted the defendants' motion for summary judgment.

The plaintiff has alleged that he was seized by defendants Doyle and unknown police officers in violation of his Fourth and Fourteenth Amendment guarantees. Defendant Doyle argues that he is immune from liability because he is entitled to qualified immunity.

The nature and the quality of the intrusion of the plaintiff's right to be free from unreasonable seizures do not support a finding that defendants Doyle and unknown police officers acted unconstitutionally when executing the search warrant. The substantial law enforcement interests outweigh the intrusion resulting from the detention of the plaintiff. The intrusion associated with a body search or an arrest of a person is much greater than the intrusion caused by detaining the plaintiff. The indignity of a body search or a compelled trip to the police station is substantially greater than the injury caused by detaining the plaintiff while a valid search warrant is executed. Because the detention was in the plaintiff's own residence, the public stigma associated with the detention was minimal. Moreover, the law enforcement interests are important and substantial, and they include the need to reduce risk of harm to the police officers and to prevent the moving, altering, and destruction of the items to be seized during the search. The items to be seized listed in the search warrant included outboard motors, automobile doors, nail guns, tool boxes, chain saws, air staplers, and various hand tools. As some of these items were small and mobile, the

police may have prevented the moving, altering, and destruction thereof as well as preventing any harm to themselves by detaining the plaintiff.

It was not unreasonable for defendants Doyle and unknown police officers to restrain the plaintiff while the officers were executing a valid search warrant. The police may detain the occupant of a home while they execute a valid warrant authorizing them to search the home for stolen property. A neutral and detached judge found that probable cause existed to believe that stolen property was located in the plaintiff's residence. It is undisputed that the plaintiff's detention did not last any longer than the time it took the defendants to conduct the search of the plaintiff's residence. The plaintiff's person was not subjected to an unauthorized search. Accordingly, the plaintiff's constitutional rights were not violated by defendants Doyle and unknown police officers, and the defendants' motion for summary judgment on this issue is granted.

Not only has the plaintiff suffered no constitutional deprivation, but also defendant Doyle is entitled to qualified immunity. Government officials performing discretionary functions are afforded qualified immunity, shielding them from civil liability. Whether an official is protected by qualified immunity generally turns on the "objective legal reasonableness" of the action, assessed in light of "clearly established" legal principles. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). The right that the official has been alleged to have violated must have been "clearly established" in a more particularized sense. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Id. at 640. The relevant inquiry in a qualified immunity case is whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his action. *Id.* at 641.

Defendant Doyle is entitled to qualified immunity because his conduct was objectively reasonable under clearly established law. Under *Michigan v. Summers*, 452 U.S. 692 (1981), a valid warrant to search a dwelling implicitly carried with it limited authority to detain the occupant of the premises while a proper search was executed by the police officers. Defendant Doyle obtained a search warrant founded on probable cause from a neutral and detached judge and, thereafter, along with unknown police officers, executed the warrant. In so doing, the defendants detained the plaintiff. While the search was performed, the plaintiff was restricted to his chair or permitted to move about the premises but only if accompanied by a police officer. A reasonable official in the defendant's position could have believed his conduct to be lawful; accordingly, defendant Doyle is entitled to qualified immunity.

The plaintiff also claims that an agreement between the defendants caused his constitutional deprivation. The plaintiff has not supported this allegation with any evidence of an agreement between the defendants. The plaintiff has merely made a conclusory statement as to the existence of an agreement between the defendants. Accordingly, summary judgment is granted as to this claim.

The plaintiff also asserts a §1983 claim against the City, alleging that defendant City has a policy and/or custom of abuse of police powers by which it fails to select, train, discipline, and supervise defendants Doyle

and unknown officers, and that such policy and/or custom breached the plaintiff's constitutional rights in violation of 42 U.S.C. §1983.

Municipalities cannot be held vicariously liable under §1983 for damages inflicted by its officers. *Molton v. City of Cleveland*, 839 F.2d 240, 243 (6th Cir. 1988). Rather, the municipality may be required to respond in damages under §1983 only for its own damages. *Id.* (citations omitted). The touchstone of a §1983 claim against a governmental body is an allegation that an official policy is responsible for a violation of the plaintiffs' constitutional rights. *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978). Also, established municipal "custom" may provide the basis for a §1983 suit against a municipality. In *Monell*, the Supreme Court stated:

> [A] local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when the execution of government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that a government as an entity is responsible under §1983.

Monell, 436 U.S. at 694. Thus, the plaintiff must demonstrate that he was deprived of a constitutional right as a result of the municipality's policy or custom.

The plaintiff has not come forward with any evidence or a policy or custom of the City which has caused his alleged injuries. Rather, the plaintiff has merely made conclusory statements about the existence of a policy or custom and has failed to support his allegations in any manner. Further, the plaintiff has not shown, or even attempted to show, how the alleged policy was the cause of any injury which he allegedly received. Accordingly,

the Court grants the defendants' motion for summary judgment on the plaintiff's §1983 claim against the City of Eastlake.

The plaintiff's state law claims are dismissed, pursuant to the rule enunciated in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

/s/ ALVIN I. KRENZLER
United States District Judge

Albert Purola
William Schmitz

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed September 24, 1991)

No. 90-4039

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES M. PECSI,
Plaintiff-Appellant,

v.

THOMAS C. DOYLE, DETECTIVE, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: JONES and SUHRHEINRICH, *Circuit Judges;* and CONTIE, *Senior Circuit Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN/sr
Clerk

AFFIDAVIT OF DETECTIVE THOMAS C. DOYLE

Case No. 1:90CV0252

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES M. PECSI,
Plaintiff,

vs.

DETECTIVE THOMAS C. DOYLE, *et al.*,
Defendants.

I, Detective, Sergeant, Thomas C. Doyle, being first duly sworn, depose and state as follows:

1. At all times relevant hereto, I have been, and am, an officer of the Eastlake Police Department.

2. At the time of the execution of this warrant, I had been a detective with the Eastlake Police Department for over ten years. Also at the time of the search, I had personally been involved in the execution of over 50 warrants.

3. In March of 1986, I attended the Federal Bureau of Investigation's National Academy and have attended over 40 police training sessions and seminars throughout my police career. (See attached Exhibit A.)

4. I received a bachelor's degree from Lake Erie College in 1980 and a master's degree in criminal justice administration from Mercyhurst College in 1988.

5. In 1989, I was named Ohio's Outstanding Peace Officer by the Ohio Prosecuting Attorney's Association.

6. On February 9, 1988, based upon a written statement by a Mr. Bruce Eddy and subsequent visual confirmation of such statement which showed the existence of contraband, a search warrant was obtained for the Pecsi household on 35685 West Island Drive in Eastlake from Judge Dennis Callahan of the Willoughby Municipal Court.

7. On February 9, 1988, at 12:24 p.m., I began the execution of the search warrant of the Pecsi household.

8. While executing said warrant, I believed that the execution was conducted within the known and established guidelines of the Fourth and the Fourteenth Amendments.

9. At the time of the execution of the warrant, I was aware that the plaintiff, Mr. James M. Pecsi, a resident of the above premises, had previously been arrested for attempted robbery in which a weapon was used and was convicted of such charge, due to the fact that I assisted the arresting officer.

10. Prior to executing the search of the Pecsi household, I investigated the criminal record of James E. Pecsi, owner of the premises, through several reporting agencies and discovered he had a lengthy criminal past dating back to 1969.

11. While executing said warrant, Mr. James M. Pecsi, who was a resident of the house at the time of the search, was detained until the house was properly secured; after such time, Mr. Pecsi was told he would be free to move around only if accompanied by an officer, so as to guarantee that none of the evidence would be tampered with or destroyed and for the safety of the officers executing the warrant.

12. Mr. James E. Pecsi placed a telephone call to his attorney, Mr. Louis Turi, who observed the search.

13. Within 15 minutes after the search began, items reported stolen were discovered within the residence of the plaintiff.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ THOMAS C. DOYLE
Thomas C. Doyle

SWORN TO BEFORE ME, a Notary Public, on this 23rd day of July, 1990.

/s/ BEATRICE CLISH
Notary Public

BEATRICE CLISH
Notary Public
State of Ohio
My Commission Expires
07-15-1992
(Recorded in Lake County)

AFFIDAVIT OF JAMES E. PECSI

Case No. 1:90CV0252

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES M. PECSI,
Plaintiff,

vs.

DETECTIVE THOMAS C. DOYLE, *et al.*,
Defendants.

Now comes James E. Pecsi, being duly sworn, and deposes and states as follows:

1. I, James E. Pecsi, own the house located at 35685 W. Island Drive, Eastlake, Ohio 44095.

2. I, James E. Pecsi, reside at the residence listed in paragraph 1 with my son, James M. Pecsi.

3. My residence, when traveling by automobile, is located approximately four miles and no more than 15 minutes from the Willoughby Municipal Court and approximately one mile and no more than five minutes from the Eastlake City Police Department.

4. On February 9, 1988, Eastlake City Police Officers, including Detective Thomas C. Doyle, conducted a search of the residence listed in paragraph one.

5. The search conducted on February 9, 1988, was made pursuant to a search warrant directed solely at myself, James E. Pecsi.

6. The search conducted on February 9, 1988 began in the morning and continued for approximately six hours ending at approximately 3:00 p.m.

7. During the course of the search conducted on February 9, 1988, neither myself nor my son was ever frisked or subject to a pat-down by Detective Doyle or any other Eastlake Police Officer.

8. During the course of the search myself and my son were forced at gunpoint to remain in a chair for approximately two to three hours.

9. During the course of the search myself and my son were only permitted to move about the house if accompanied by a police officer.

10. At no time during the course of the search was my son or myself permitted to leave, even upon request.

/s/ JAMES E. PECSI
James E. Pecsi

SWORN TO AND SUBSCRIBED BEFORE ME on this 10th day of September, 1990.

/s/ CAROL L. CONNOR
Notary Public

AFFIDAVIT OF JAMES M. PECSI

Case No. 1:90CV0252

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES M. PECSI,
Plaintiff,

vs.

DETECTIVE THOMAS C. DOYLE, *et al.*,
Defendants.

Now comes James M. Pecsi, being duly sworn, and deposes and states as follows:

1. I, James M. Pecsi, am the Plaintiff in the action, *Pecsi v. Detective Thomas C. Doyle, et al.* Case No. 1:90CV0252 currently pending in the United States District Court for the Northern District of Ohio.

2. I, James M. Pecsi, reside with my father James E. Pecsi, in a house owned by him at 35685 W. Island Drive, Eastlake, Ohio 44095.

3. My residence listed in paragraph 2, when traveling by automobile, is located approximately four miles and no more than 15 minutes, from the Willoughby Municipal Court and approximately one mile and no more than five minutes from the Eastlake City Police Department.

4. On February 9, 1988, Eastlake Police Officers, including Detective Thomas Doyle, conducted a search of the residence located at 35685 W. Island Drive, Eastlake, Ohio 44095.

5. The search conducted on February 9, 1988, was made pursuant to a search warrant directed solely at my father James E. Pecsi.

6. The search conducted on February 9, 1988 began in the morning and continued for approximately six hours ending at approximately 3:00 p.m.

7. During the course of the search conducted on February 9, 1988, I was never frisked or subject to a pat-down by Detective Doyle or any other Eastlake Police Officer.

8. During the course of the search I was forced at gunpoint to remain in a chair for approximately two to three hours.

9. During the course of the search I was only permitted to move about the house if accompanied by a police officer.

10. At no time during the course of the search was I permitted to leave, even upon request.

/s/ JAMES M. PECSI
James M. Pecsi

SWORN TO AND SUBSCRIBED BEFORE ME on this 10th day of September, 1990.

FIRST SET OF COMBINED INTERROGATORIES, REQUEST FOR PRODUCTION OF DOCUMENTS, AND REQUEST FOR ADMISSION

Case No. 1:90CV0252

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES M. PECSI,
Plaintiff,

vs.

DETECTIVE THOMAS C. DOYLE, *et al.*,
Defendants.

Defendant, Thomas C. Doyle, hereby served the following combined *Interrogatories* and *Request for Production of Documents* (hereinafter sometimes the "Discovery") upon Plaintiff, James M. Pecsi, pursuant to the Federal Rules of Civil Procedure. Plaintiff, James M. Pecsi, or his counsel, is directed to answer each Interrogatory separately and fully in writing and under oath and to produce each Document Request at the office of KITCHEN, MESSNER & DEERY to William F. Schmitz, 1100 Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, within thirty (30) days after service.

This Discovery is continuing in nature. Any additional information or document responsive hereto shall be supplied immediately upon its being obtained,

discovered, or brought to the attention of defendant or defendants' counsel after the initial response to this Discovery.

* * * * *

(10) *INTERROGATORY.* Describe how long the execution of the search warrant took on February 9, 1988.

(11) *INTERROGATORY.* State the time that the Eastlake police officers finished conducting the search on February 9, 1988.

(12) *INTERROGATORY.* Identify the attorney referred to in Paragraph 11 of the complaint.

Lou Turi

(13) *INTERROGATORY.* State the time which the attorney identified in the Interrogatory above arrived at plaintiff's home on February 9, 1988.

(14) *REQUEST FOR ADMISSION.* Do you admit that this attorney represented you throughout the remainder of the search on February 9, 1988?

No

(15) *INTERROGATORY.* If your answer to the foregoing Request for Admission is anything other than an unqualified yes, please state your reasons for the denial.

I didn't hire or pay for him to be there

(16) *REQUEST FOR ADMISSION.* Do you admit that the detention referred to in Paragraph 9 of the complaint did not last any longer than the time it took defendants to conduct the search?

Yes

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

No. 91-1042

IN THE

Supreme Court of the United States

October Term, 1991

THOMAS C. DOYLE, Detective; CITY OF EASTLAKE; JOHN DOES, Unknown Eastlake Police Officers,
Petitioners,

vs.

JAMES M. PECSI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I

The petitioners' first claim is that the five to six hour detention of a non-charged[1] occupant of a house searched pursuant to a warrant[2] ought to be held constitutional. They seek, in effect, to constitutionalize the facts of this case. The Sixth Circuit did not hold it was unconstitutional; it only said based on the record[3] available at this stage, the "reasonableness" of some of the detention was a question of fact.

Therefore, this petition seeks to have this Court decide something the Court of Appeals below did not decide. The Sixth Circuit decision is very much in line with this Court's cases, some of them very recent, that "application [of the fourth amendment reasonableness test] requires careful attention to the facts and circumstances of each particular case . . . ." *Graham v. Connor*, 490 U.S. 386, 396.

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[1] Astonishingly respondent Pecsi has now been indicted for possession of this allegedly stolen property. He was indicted September 17, 1991 for a February, 1988 event, after the Sixth Circuit reversed the District Court's grant of summary judgment.

[2] Much is made in the petitioners' argument that the validity of the warrant was not challenged. That assertion is incorrect. The warrant was attacked in the motion for judgment on the pleadings in the District Court. It is well to note respondent has yet had no opportunity to challenge the warrant in any meaningful way.

No doubt at trial the reasonableness of the warrant and the validity of the allegations given to the magistrate will be included to help to determine the entire contour of fourth amendment reasonableness. (Some specific criticism of the warrant was made in the Court of Appeals but it did not receive comment. That Court also concluded, incorrectly we argue, this was a valid warrant. Opinion of the Court of Appeals, appendix to the petition for certiorari, page A2.)

[3] It is common knowledge that "facts" at the summary judgment stage are usually developed in the lawyer's office, as opposed to the courtroom.

The petitioners seek a bright line rule (that detention of an occupant is reasonable where it is no longer than the time necessary to conduct the search) which is a complete reversal of this Court's 1979 observation in *Bell v. Wolfish*, 441 U.S. 520, that "reasonableness under the fourth amendment is not capable of precise definition or mechanical application," *id.*, 559, which *Graham* reaffirmed in 1989. And they seek to do it where the search was not for contraband,[4] but mere evidence, and where the crime at issue was receiving stolen property and there was no claim of threat, resistance or flight.

By finding there were "too many unanswered factual questions to be resolved on summary judgment," opinion of the Court of Appeals, page A5, appendix to petition for certiorari, the Sixth Circuit did nothing more or less than recognize "reasonableness" is "not capable of precise definition or mechanical application". *Bell v. Wolfish, supra.*

II

The petitioner's second question presented seeks to establish by national constitutional fiat what cannot be established by objective facts.

The Sixth Circuit held that the historical fourth amendment tests of reasonableness were not established by the stark assertions of the summary judgment record regarding the amount of time it may or may not have been necessary to hold James Pecsi at gun point in his house. As noted, a search for "evidence" without threat, or flight, or resistance does not provide the factual predicate for the question presented.

[4] The District Court and the Sixth Circuit both ignored the distinction identified in *Michigan v. Summers*, 452 U.S. 692, 705 n20, between a search for "contraband" and one for "mere evidence." This search was for evidence only, which is another reason the case does not actually raise the constitutional question presented.

No good reason is advanced to warrant retreat from long term principles that require us to look at the facts of each case in the fourth amendment context. Solicitude for the police does not require giving them carte blanche nor does it warrant ignoring the textual requirement of "reasonableness" found in the fourth amendment. To answer the petitioners' second question presented in the affirmative would have that effect.

III

Contrary to their earlier submission, the petitioners claim in essence there can never be any "clearly established law" in the fourth amendment arena since "reasonableness" must be decided on a case by case basis. And since liability only attaches after an officer violates "clearly established law", all police will be immune since they could not know in advance their conduct was unreasonable.

That this is a sophistry is self-evident. The "objective legal reasonableness" of this conduct turns on the factors identified in *Graham v. Connor*, plus whatever others may be relevant in examining the officer's conduct in a particular case. To suggest otherwise is to remove the fourth amendment from Section 1983 altogether.

Anderson v. Creighton, 483 U.S. 635 and *Harlow v. Fitzgerald*, 457 U.S. 800 provide a workable, if not perfect, test for balancing liability and immunity. Nothing about the facts of this case provides any basis for re-examining those tests, or for further segregating the fourth amendment from the rest of the Constitution.

CONCLUSION

Because the "reasonableness" inquiry will always be fact based there is no likelihood of conflict among the circuits on the tests to be applied in these cases. None is cited here.

The record here is too thin and too fact specific to justify the use of this Court's discretionary jurisdiction even if the legal question warranted it.

The petition for certiorari should be denied.

Respectfully submitted,

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